NO. 83-726

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

FIRST AMERICAN TITLE COMPANY OF SOUTH DAKOTA and FIRST AMERICAN TITLE INSURANCE COMPANY OF SOUTH DAKOTA,

Petitioners,

v.

SOUTH DAKOTA LAND TITLE ASSOCIATION, SOUTH DAKOTA ABSTRACTERS' BOARD OF EXAMINERS, BLACK HILLS LAND AND ABSTRACT COMPANY, DENNIS O. MURRAY, SECURITY LAND AND ABSTRACT COMPANY, ESTATE OF GLEN M. RHODES, FALL RIVER COUNTY ABSTRACT COMPANY, CHARLES E. CLAY, CUSTER TITLE COMPANY, BETTY J. GOULD, HAAKON COUNTY ABSTRACT COMPANY, KEITH EMERSON, WAYNE ROE, CHARLES NASS, and STATE OF SOUTH DAKOTA,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PRELIMINARY STATEMENT

Respondents, State of South Dakota and the South Dakota Abstracters' Board of

Examiners will be referred to in this Brief as the "State Respondents." The State Respondents agree with Petitioners' statement of the Parties to the Proceeding, the statement of Jurisdiction and the statement of the Opinions Rendered Below.

STATUTORY PROVISIONS INVOLVED

The State Respondents add the following state statutory and administrative provisions:

SDCL 36-13-8

SDCL 36-13-10

SDCL 36-13-25

SDCL 36-13-26.1

SDCL 58-25-16

ARSD 20:36:04:01

ARSD 20:36:07:01

ARSD 20:36:07:02

(See Appendix for text)

STATEMENT OF THE CASE

The State Respondents agree with Petitioners' statements, in the Litigation Background portion of their Petition, that this action originated through Petitioners' filing of a broad and sweeping antitrust complaint in the Federal District Court, District of South Dakota and that the District Court and subsequently, the United States Court of Appeals for the Eighth Circuit found all of Petitioners contentions for relief under the federal antitrust laws to be unfounded or barred.

Prior to July 1, 1979, SDCL 58-25-16 required the countersignature of a licensed abstracter only on title insurance policies issued by foreign title insurance companies. Walter Linderman, president of both Petitioners, as early as 1972-73 discovered that a domestic title insurance company would not be subjected to the existing countersignature

requirements. Linderman, determined to take advantage of what he perceived as a loophole in the regulatory scheme; and set forth to establish a domestic title insurance company. By 1978, Linderman succeeded in becoming a licensed abstracter and with the financial support of a large foreign title insurance company created an abstract title plant and domestic title insurance company in Pennington County, South Dakota. The abstract title plant was constructed in accordance with the long-standing abstract title plant regulations of the South Dakota Abstracters' Board of Examiners. Linderman conceded that throughout this entire period of time he was acutely aware that the South Dakota Legislature could take away the competitive advantage of his domestic title insurance company.

Effective July 1, 1979, due in part to the lobbying efforts of state abstracters and board members of the South Dakota Abstracters' Board of Examiners, SDCL 58-25-16 was amended to delete the word "foreign." Shortly after this legislative change went into effect, Petitioner, First American Title Insurance Company of South Dakota ceased doing business and was dissolved.

In 1980, the South Dakota Legislature resolved an existing conflict within the State as to which state agency, the South Dakota Division of Insurance or the South Dakota Abstracters' Board of Examiners was authorized by law to promulgate rules and regulations governing the countersigning of title insurance policies. After lobbying by all interested entities, the State Legislature amended SDCL 36-13-25 to empower the South Dakota Abstracters' Board of Examiners

to establish a schedule of fees and requirements for abstracter services in countersigning title insurance policies pursuant to SDCL 58-25-16. The Legislature also statutorily defined what constituted a countersignature upon a title insurance policy in SDCL 36-13-26.1. This statutory provision superseded an earlier state circuit court opinion that held, under the then existing law, that a countersignature was merely a ministerial act.

As a result of the 1980 amendments, the South Dakota Abstracters' Board of Examiners promulgated the following rules: ARSD 20:36:07:01, 20:36:07:02 and 20:36:07:03. These rules were promulgated pursuant to the State's rules of administrative procedure in SDCL Chapter 1-26. These rules were reviewed and approved by the South Dakota Attorney General's Office and reviewed by the South Dakota Legislature's Interim Rules Review Committee.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I

THE QUESTIONS RAISED IN THE PETITION FOR WRIT OF CERTIORARI ARE ONLY A REQUEST FOR THIS COURT TO RENDER AN ADVISORY OPINION.

A. The Decision of the United States Court of Appeals for the Eighth Circuit rests on an adequate and independent ground apart from the "state action doctrine."

Petitioners have raised two questions in their Petition for Writ of Certiorari. These questions pertain solely to the issue of whether the state action doctrine, as pronounced by this Court in Parker v. Brown, 317 U.S. 341 (1943) and subsequent cases, saves the challenged portions of South Dakota's regulatory scheme from invalidation. Petitioners' questions as well as their reasons for the granting of a Writ of Certiorari make the baseless assumption that South Dakota's regulatory scheme so

irreconcilably conflicts with the Sherman Act as to mandate preemption.

The Eighth Circuit in its Opinion below correctly noted; "It is . . . self-evident that application of state action principles follows the antitrust court's initial determination that there is truly a conflict between the Sherman Act and the challenged regulatory scheme." See Petition, App. 25. Thus, prior to making any determination as to whether the state action doctrine saved South Dakota's regulatory scheme, the Eighth Circuit reviewed the issue of preemption and specifically held that South Dakota's regulatory scheme was not preempted because there was no irreconcilable conflict between the regulations and the Sherman Act. See Petition, App. 28.

It was only after this specific holding that the Eighth Circuit stated:

> Furthermore, even if we assumed that the challenged aspects of the regulatory scheme conflicted with the Sherman Act sufficiently to require preemption, we would hold that the scheme reflects a clearly articulated and affirmatively expressed state policy to replace unfettered business freedom with regulation. See, Orrin W. Fox, supra, 439 U.S. at 109. Thus the state action doctrine would apply to preclude preemption.

See Petition, App. 25. It was out of the following discussion concerning the state action doctrine that the statements concerning what steps must be taken by a state acting as a sovereign to save a regulatory scheme from invalidation arose.

The Eighth Circuit's preemption holding provides an adequate and independent ground to support the decision below and the validity of South Dakota's regulatory scheme as it pertains to the construction of abstract title plants and countersigning title insurance policies. This holding, which has

not been contested by Petitioners, can be viewed as reducing the Eighth Circuit's subsequent discussion concerning the state action doctrine to merely dicta.

B. The United States Court of Appeals for the Eighth Circuit's holding that the Sherman Act did not preempt the challenged portion of South Dakota's regulatory scheme is in accord with the decisions of this Court.

The Eighth Circuit's holding concerning the preemption of South Dakota's regulatory scheme by the Sherman Act is in accord with this Court's decision in Rice v. Norman Williams Co., ____ U.S. ____, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982); California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) and Parker v. Brown, supra. This Court in Rice, supra, 73 L.Ed.2d at 1049 stated at the inquiry used in determining whether the Sherman Act preempts a state regulatory scheme "is whether there exists an irreconcilable conflict between the federal and state regulatory schemes."

After reviewing the preemption issue, the Court in Rice, supra 73 L.Ed.2d at 1051 concluded:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistable pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category . . . the statute cannot be condemned in the abstract.

The Eighth Circuit, after noting that Petitioners presented no direct evidence at trial that indicated exactly how costly it was to assemble an abstract title plant pursuant to ARSD 20:36:04:01, set forth, consistent with this Court's decision in Rice, to review this regulation in the

abstract. Petitioners argued, the anticompetitive result of the regulation is to create a horizontal division of territories under which each abstracter is assured of a monopoly of the abstracting business in a county where the abstracter is licensed to operate. See Petition, App. 20, 25-28. The Eighth Circuit rejected Petitioner's argument stating; "[I]t cannot be said that the regulation mandates or authorizes conduct that in all cases constitutes a § 1 violation." See Petition, App. 28. The court went on to note that the experience of the Petitioners, Walter Linderman becoming a licensed abstracter and the construction of a abstract title plant in Pennington County under the State's regulatory scheme that competed on an equal footing with the other licensed abstracter in the county at that time, was strong evidence to support its holding.

In their Petition, Petitioners have sought to combine several regulatory provisions in an effort to bootstrap their assertion of a per se violation. The lack of any evidence to support such a contention, together with Petitioners' contrary experience in Pennington County, however, results in a record that totally supports the decision of the United States Court of Appeals for the Eighth Circuit.

CONCLUSION

Petitioners are requesting this Court to grant a Writ of Certiorari to review questions that cannot result in a reversal or even a remand of the decision of the United States Court of Appeals for the Eighth Circuit. The holding by the Eighth Circuit that South Dakota's regulatory scheme was not preempted by the Sherman Act, is separate and independent from the questions raised in the Petition for a Writ of Certiorari concerning

the Eighth Circuit's discussion of the state action doctrine. The Petitioners total failure to contest this holding results in a plea to this Court to review a case where at most it can only revise a portion of the Eighth Circuit's Opinion or issue an advisory opinion for future cases.

Though the State Respondents are confident that if this Court grants a Writ of Certiorari and reviews the Eighth Circuit's statements concerning the state action doctrine, the resulting decision would uphold the Eighth Circuit's opinion below. Such a review, given the impossibility to affect the outcome of the case, is a waste of this Court's most valuable resource, time.

In addition, the use of this case as a vehicle for an advisory opinion as to what action a state, in its capacity as sovereign, is required to take to save a regulatory scheme from invalidation is not necessary.

As Petitioners have noted in their Petition, Ronwin v. State Bar of Arizona, 686 F.2d 692 (9th Cir. 1981), cert. granted, Hoover v. Ronwin, 103 S.Ct. 2084, 77 L.Ed.2d 296 (1983), provides this Court with a case in which it can decide this issue and resolve any conflict that may exist among the circuits relating to the application of the state action doctrine.

Based upon the above arguments and authorities, the State Respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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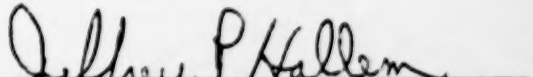
ATTORNEY GENERAL



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APPENDIX

36-13-8. Certificate of registration required for business of abstracting. Any person desiring to engage in or continue the business of abstracting of titles to property within the state must first obtain a certificate of registration, file the required bond and comply with the other requirements of this chapter and the rules and regulations established thereunder except as hereinafter otherwise provided.

36-13-10. Abstract plant required to engage in business--Compliance with other requirements. Any person desiring to engage in or continue the business of abstracting of titles to property within the state shall have a set of abstract books or set of indexes or other records showing in a sufficiently comprehensive form, all instruments affecting the title to real estate which are of record or on file in the office of the register of deeds of each county wherein said person seeks to engage in compiling abstracts of land titles and shall first obtain a certificate of registration, file the required bond, and comply with the other requirements of this chapter and the rules and regulations of the abstracters' board of examiners made pursuant to law.

36-13-25. Fee schedules established by board--Exceeding schedule as misdemeanor. The South Dakota abstracters' board of examiners shall by rule or regulation, adopted pursuant to chapter 1-26, establish a schedule of fees for doing business under the provisions of this chapter and shall furnish

to each licensed abstracter a copy of such schedule and any amendments. The board shall also establish a schedule of fees and the requirements for an abstracter's services for countersigning title insurance policies pursuant to § 58-25-16. It is a Class 2 misdemeanor to exceed the schedule established by the abstracters' board of examiners.

36-13-26.1. Abstracter's countersignature on title policy. An abstracter's countersignature on a title insurance policy is verification that the abstracter has furnished the insurer a report based on the examination of record title and any other title information and services required by the insurer and § 36-13-25.

58-25-16. Countersignature by agent or abstracter of county required--Violation as misdemeanor. No insurance company shall issue any policy of title insurance or certificate of title or other guarantee of title, covering any property located within the state of South Dakota, unless the same is countersigned by a person, partnership or corporation, who has met the requirements of §§ 36-13-8 and 36-13-10 in the county in which the real property is located, or maintain an abstract plant in the county where the real property is located and meets the requirements of chapter 36-13. A violation of this section is a Class 2 misdemeanor.

ARSD 20:36:04:01. General requirements for books, records, and indexes. Before any person, firm or corporation shall be entitled to a certificate of registration to engage in abstracting under the laws of South Dakota, he shall have an approved abstract plant containing the following:

(1) A complete index showing every instrument recorded in the register of deeds office in the county wherein he proposes to operate, properly listed against the specific property which it affects, and also a separate index showing all recorded instruments which do not affect specific property. This index may be compiled on cards, in bound books, or a loose leaf form, but must be made from an actual check of each page of each book or recorded instruments in said office, and in no case will a copy or film of the numerical index in the register's office be accepted;

(2) In case a numerical index is used showing only the book and page of each instrument, then and in that case such index must be supplemented by a take-off of each instrument properly arranged in the said abstract plant so that it can be located from his own numerical index. Such take-off shall be sufficiently complete to show all esential parts of each instrument, such names, dates, descriptions, acknowledgments, filing, and any special or unusual recitals, covenants, warranties, exceptions, or reservations. Such take-off may be made on cards on loose leaf form or in bound books or film:

(3) If the form of index is a card, a loose leaf sheet, or the page of a bound book showing all instruments affecting a particular piece of farm land, or town lot or block, then such index must be in such form as to show all names, dates, acknowledgments, seals, and filings, and also a column to show any special or unusual recitals in each instrument.

ARSD 20:36:07:01. Title search required for countersignature. An abstracter shall search the records contained in the abstracter's plant and in the courthouse which relate to the property being insured before he countersigns a policy of or commitment for title insurance pursuant to SDCL 58-25-16.

ARSD 20:36:07:02. Title search requirements. The title search required for a commitment for or policy of title insurance shall be made under the direction of an abstracter licensed in the county in which the property is located, who shall countersign the title insurance policy pursuant to SDCL 58-25-16.

The results of the search shall be forwarded to the agent or company that is to issue the policy in the same order of business as is normally conducted by the abstracter. Delays in the search or reporting shall be cause for complaint and disciplinary proceedings by the abstracter's board of examiners.